

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5691 IN THE)
NAME OF JEROME CHEESE)
COMPANY)
_____)

FINAL ORDER

On September 14, 2000, the hearing officer for the Idaho Department of Water Resources (“Department”) issued an Amended Preliminary Order in connection with the above captioned matter. On September 28, 2000, the City of Jerome (“city” or “protestant”) filed a *Petition For Review of Amended Preliminary Order and Exceptions to Amended Preliminary Order*. On October 6, 2000, Jerome Cheese Company (“applicant”) filed Jerome Cheese Company’s *Brief in Opposition to Petition for Review of Amended Preliminary Order and Exceptions to Amended Preliminary Order*.

The protestant’s exception to the amended preliminary order states:

The City respectfully takes exception because, while the hearing officer appropriately found that the City of Jerome and its customers would be negatively impacted by about \$41,300 and that the impact fell within the local public interest criteria (sic), he erred by failing to deny the application for transfer or condition it upon the payment of the \$41,300 in order to alleviate the undisputed, negative local impact.

The protestant provided six arguments in support of the exception. The Department provides the following responses to the arguments of the protestant in the order set forth by the protestant.

Argument 1. The protestant argues that the Department has a statutory obligation to protect the local public interest. In the protestant’s view, the hearing officer, after identifying a financial loss to the City of Jerome if the transfer is approved, had an obligation to fully protect the city from that loss. The protestant bases this view upon *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985).

Department Response to Argument 1. The hearing officer concluded that the economic impact of a departing municipal customer does come within the purview of the local public interest criterion and could result in a denial or conditional approval if necessary to protect the local public interest (Conclusion of Law No. 6). Based on the hearing record, it is undisputed that the protestant will incur a short-term loss of revenue of approximately \$41,300 when the applicant ceases to use and pay for city water, which

is the equivalent of \$1.50 a month for 9 months for the remaining water users of the city (See Finding of Fact No. 17). The hearing officer also found that the city has an operating reserve account that could be used to offset this short-term revenue loss (Finding of Fact No. 18). In addition, the hearing officer found that the applicant's independent water supply may contain reduced sediment levels and may be delivered to the plant at a more consistent pressure than the water supply provided by the city (Finding of Fact No. 20).

The finding by the hearing officer that the protestant would incur a short-term loss of revenue as a result of the transfer does not mean that the Department must either deny the transfer application or condition its approval upon the payment of \$41,300 to the protestant. To the extent that the financial impact is a factor relevant to the local public interest, Idaho Code § 42-222 applied in accordance with the court's guidance in *Shokal* provides for balancing all relevant factors to determine whether approval of the transfer application is in the local public interest. Hence, the Department does not have a mandatory duty to either deny the application or require the applicant to pay \$41,300 to the protestant.

In this case, the hearing officer weighed the interests of the applicant in seeking an independent water supply (Finding of Fact No. 12) against the interests of the city in being compensated for a reduction in revenue from its municipal water system (Finding of Fact No. 17). After balancing the relative interests of the applicant against those of the city and the other users of the municipal system, the hearing officer concluded that the applicant should not be held financially responsible to the city for ceasing to avail itself of the municipal water supply (See Conclusions of Law Nos. 7, 8, and 9).

The hearing officer's handling of the local public interest criterion in this case is consistent with the direction provided to the Department in *Shokal*. The Idaho Supreme Court in *Shokal* noted that among those factors that ought to be considered part of the local public interest are "the proposed appropriation's benefit to the applicant" and "its economic effect." 109 Idaho at 338, 707 P.2d at 449. The Court cautioned that: "The relevant elements and their relative weights will vary with local needs, circumstances, and interests." 109 Idaho at 339, 707 P.2d at 450. Finally, the Court held that: "The determination of what . . . the public interest requires, is committed to Water Resources' sound discretion." *Id.* The Director concurs with the determinations of the hearing officer that the applicant met its required burden under the local public interest criterion, and that the local public interest does not require the applicant to compensate the city for the temporary loss in revenue to the municipal water supply system under the facts of this case.

Argument 2. The protestant argues that the applicant has the ultimate burden of proof to show that the proposed transfer of water right is in the local public interest and

infers that the applicant has not met its burden.

Department Response to Argument 2. The applicant does have the ultimate burden of proof and has met its burden by showing that the transfer is in the local public interest. The hearing record describes the contribution to the general economy of the Jerome area resulting from the applicant's operation and the importance of the water supply sought in the transfer application to the continued viability of the operation. The hearing officer concludes that the benefits to the local area more than offset the costs that may be incurred by the protestant by losing the applicant as a user of municipal water (see also the discussion under the response to Argument 1).

Argument 3. The protestant argues that the Amended Preliminary Order attempts to evade rather than perform the duty to protect the local public interest and does not show the weight given to local public interest factors.

Department Response to Argument 3. A fair reading of the Amended Preliminary Order indicates that the hearing officer weighed the temporary adverse economic effects upon the city's water supply system against the economic and operational interests of the applicant in developing an independent water supply for its cheese plant and concluded that the local public interest criterion does not require the applicant to compensate the city for lost revenue under the circumstances of this case (see also the discussion under the response to Argument 1).

Argument 4. The protestant argues that the Department does not have discretion to ignore undisputed harm to a protestant by finding that the protestant could have protected itself from the harm or that the harm is not excessive or could be passed on to others.

Department Response to Argument 4. As explained in the response to Argument 1, the fact that the Department has recognized the adverse economic impact upon the city's water supply system does not mean that the Department has an obligation to require that the city be compensated for that lost revenue. The Amended Preliminary Order recognizes the adverse economic impact upon the city and weighs that impact against the interests of the applicant in establishing an independent water supply for its cheese plant.

Argument 5. The protestant states that failure of the Amended Preliminary Order to show that the applicant is responsible for the cost of ceasing to use the services of the protestant is a breach of the duty to protect the local public interest.

Department Response to Argument 5. As discussed in response to the previous arguments, the hearing officer properly addressed the loss of revenue to the protestant in

applying the local public interest criterion to the application.

Argument 6. The protestant states that the Amended Preliminary Order does not reveal whether the hearing officer properly applied the ultimate burden of persuasion.

Department Response to Argument 6. Conclusions of Law 5 and 13 have been amended in this Final Order to clearly state that the applicant has the burden of proof and that the applicant has met its burden. With these changes, the Findings of Fact and Conclusions of Law in the Amended Preliminary Order properly assign the burden of proof to the applicant and provide adequate rational for concluding that the applicant has met its burden to allow approval of the transfer with the conditions imposed in the Order.

The request of the protestant to remand the matter back to the hearing officer is denied. The request for oral argument on the petition before the Director also is denied.

Having made the changes noted in the Response to Argument 6 and having added Findings of Fact 21, 22, 23, and 24, the Director hereby issues this order as the Final Order of the Department.

FINDINGS OF FACT

1. On December 16, 1997, the Snake River Basin Adjudication ("SRBA") District Court issued a partial decree to C. Jeffrey Bragg and Sandra K. Bragg as follows:

Identification No: **36-02461**
Source: Ground water
Priority: January 12, 1961
Rate of diversion: 4.3 cubic feet per second ("cfs")
Volume: 1,216 acre feet per annum ("AFA")
Points of diversion: NW1/4NE1/4 Section 20, NE1/4NW1/4 Section 21, T7S, R18E, B.M.
Use: Irrigation
Place of use: 304 acres in parts of Section 21, T7S, R18E, B.M., Jerome County

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

2. On December 16, 1997, the SRBA District Court also issued a partial decree to C. Jeffrey Bragg and Sandra K. Bragg as follows:

Identification No: **36-02554**
Source: Ground water
Priority: August 31, 1962
Rate of diversion: 4.4 cfs

Volume: 1,068 AFA
Points of diversion: NWNE Section 20, NENW Section 21, T7S, R18E, B.M.
Use: Irrigation
Place of use: 267 acres in parts of Sections 17, 20 and 21, T7S, R18E, B.M., Jerome County

3. On March 15, 2000, the applicant (Jerome Cheese Company) submitted Application for Transfer No. 5691 ("application") to the Department seeking to change the points of diversion, place of use, season of use, and nature of use of parts of decreed right nos. 36-02461 and 36-02554 to commercial use.

4. More specifically, the applicant proposes to change a total of 2.7 cfs and 516 AFA of ground water from irrigation use to year-round commercial use for a cheese plant located in N1/2 NE Section 25, T8S, R16E, B.M. and to divert the water from two wells located in the NWNE Section 25, T8S, R16E, B.M. The amount of water right no. 36-02461 to be changed is 0.82 cfs and 174 AFA made available by drying up 58 acres within Section 21, T7S, R18E, B.M. The amount of water right no. 36-02554 to be changed is 1.88 cfs and 342 AFA made available by drying up 114 acres in parts of Sections 17, 20, and 21, T7S, R18E, B.M.

5. The Department published notice of the application which was subsequently protested by the City of Jerome and the Idaho Rural Council. Key Bank National Association ("Key Bank") requested and was granted party status through intervention in the matter. The Idaho Rural Council subsequently withdrew its protest.

6. On July 25 and 26, 2000, the Department conducted a hearing on the application. The applicant was present and was represented by Christopher H. Meyer. Patrick D. Brown represented the city. Lee Halper appeared as a public witness in opposition to the application. Key Bank did not appear at the hearing and on August 16, 2000, withdrew its intervention.

7. The issue raised by the city is whether the proposed changes are contrary to the local public interest. The issue was further limited to "the financial impacts of the loss of revenue resulting from the applicant's acquisition of an independent water supply" together with local public interest issues that may be identified through the discovery process. The other criteria described in Idaho Code § 42-222 were not raised as issues, but the criteria must be considered by the Department whether or not raised as issues by the parties.

8. Exhibits premarked, offered, or accepted as a part of the record are as follows:

- a. Applicant's Exhibit 1 - NOT OFFERED
- b. Applicant's Exhibit 2 - NOT OFFERED

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| c. | Applicant's Exhibit 3 - | Bar graph titled Jerome City Water Earnings & Jerome Cheese Water Payments |
| d. | Applicant's Exhibit 4 - | Memorandum dated July 11, 2000, to Chris Meyer from Don Reading and a bar chart |
| e. | Applicant's Exhibit 5 - | Jerome Water Reserve Balances 1996 – 2000 |
| f. | Applicant's Exhibit 6 - | Faxed Letter dated July 1, 1995, to Larry Paine/City of Jerome from Larry Evans and letter dated July 31, 1995, to Larry Paine from Larry Evans |
| g. | Applicant's Exhibit 7 - | Bill No. 272, Ordinance No. 799 |
| h. | Applicant's Exhibit 8 - | NOT OFFERED |
| i. | Applicant's Exhibit 9 - | Jerome Cheese Water Revenue Analysis - April 24, 2000 |
| j. | Applicant's Exhibit 10 - | NOT OFFERED |
| k. | Applicant's Exhibit 11 - | NOT OFFERED |
| l. | Applicant's Exhibit 12 - | Letter dated March 22, 2000, to Christopher H. Meyer from Robert E. Williams |
| m. | Applicant's Exhibit 13 - | NOT OFFERED |
| n. | Applicant's Exhibit 14- | InSQL Trend (pressure graphs) |
| o. | Applicant's Exhibit 15 - | NOT OFFERED |
| p. | Applicant's Exhibit 16 - | NOT OFFERED |
| q. | Applicant's Exhibit 17 - | NOT OFFERED |
| r. | Applicant's Exhibit 18 - | Don C. Reading – Resume |
| s. | Applicant's Exhibit 19 - | Affidavit No. 1 of Don C. Reading |
| t. | Applicant's Exhibit 20 - | Jerome City Water Department Reserve Balances & Jerome Cheese Payments 1996-2000 |

- u. Applicant's Exhibit 21 - Table 6. Irrigated Land: 1997 and 1992
- v. Applicant's Exhibit 22 - City of Jerome, Idaho, Statement of Revenue and Expenses - FY 96, FY 97, FY 98 and FY 99
- w. Applicant's Exhibit 23 - Hydrant Flow Result Sheet
- x. Applicant's Exhibit 24 - NOT OFFERED
- y. Applicant's Exhibit 25 - NOT OFFERED
- z. Applicant's Exhibit 26 - NOT OFFERED
- aa. Applicant's Exhibit 27 - NOT OFFERED
- ab. Applicant's Exhibit 28 - Fax to Robert E. Williams from Chris Meyer together with Telephone Memoranda
- ac. Applicant's Exhibit 29 - NOT OFFERED
- ad. Applicant's Exhibit 30 - Preliminary Engineering Report Water Supply and Distribution System - City of Jerome, Idaho - November 1995
- ae. Protestant's Exhibit A - InSQL Trend (pressure graphs)
- af. Protestant's Exhibit B - Schematic drawing
- ag. Protestant's Exhibit C - Graph - Pressure v. Time

9. The hearing officer officially noticed information in the Department's records including the Preliminary Order issued by the Department on October 12, 1999, for Transfer No. 5401, which was also filed in the name of Jerome Cheese Company (the Preliminary Order became a Final Order on November 2, 1999); previous orders of the Department as those orders may apply to Application for Transfer No. 5691; the Department's water right records; and applicable hydrologic data.

10. The applicant has operated a cheese making plant ("plant") near Jerome, Idaho since 1992 or 1993. The plant is the largest of the Davisco holdings with an annual revenue of about \$300 million. Milk is purchased within five Idaho counties. The applicant purchases about 4 million pounds of milk daily from 70 dairies, which is the equivalent of milk from approximately 65,000 cows. The plant employs about 160 people with an annual payroll of nearly \$4 million. Approximately 40 people are employed in the trucking of around 75 loads of milk to the plant each day.

11. The city provides municipal water to the applicant for use in the plant. In 1996, the city increased the rate charged for water to 57 cents per 100 cubic feet, almost doubling the charges. A written contract does not exist between the city and the applicant for the delivery of municipal water. The arrangement between the city and the applicant for the use of municipal water was described by the city administrator as “the city provides the water and the applicant pays for it.” There is a written contract, however, between the city and the applicant for the discharge of wastewater from the plant to the city’s wastewater treatment facilities.

12. The applicant seeks its own independent water supply primarily for economic reasons but has also expressed to the city dissatisfaction with flow rate, pressure, and sediment in the water provided by the city. The applicant has two (2) interconnected wells that were constructed by the applicant pursuant to Transfer No. 5401. Both of the wells are 350 feet deep, have 12-inch diameter casing, and are equipped with pumps and 125 horsepower motors. The diameter of the mainline discharging water from the wells is 8 inches. The plant presently needs about 800 gallons of water per minute (1.78 cfs) at 75 psi, but was designed for a larger rate of flow.

13. The applicant proposes to change the place of use of ground water from a portion of the “Bragg” water rights to the plant by drying up 172 acres of land at the original place of use for the rights. Drying up 172 acres corresponds to a diversion volume of water of 688 AFA and a consumptive use volume of 516 AFA. Neither the rate of diversion, total volume of water diverted, nor the consumptive volume of water to be used at the plant will be greater than for the present place of use for the portion of the water rights sought for transfer.

14. The remainder of water rights nos. 36-02461 and 36-02554 that are not included in Application for Transfer No. 5691 will be used for irrigation as authorized by the rights.

15. The applicant does not believe that the economic effect of a departing municipal water use customer on the remaining water customers should be included within the purview of the local public interest and has suggested that the Department would be acting as a “roving economic cop” and would be engaging in “social engineering” in considering such factors.

16. Pumping of water from the applicant’s well does not materially lower the water level in other wells in the vicinity, including the city’s wells (see Transfer No. 5401 - Finding No. 18 at 5).

17. The city does not want to lose revenue paid by the applicant for municipal water, since the applicant is the city’s largest municipal water customer. The city has estimated the short-term impact to the city resulting from the loss of the applicant as a customer to be a total of approximately \$41,133. The city suggests that the loss would have to be borne by the remaining water users who would have to pay an additional \$1.50 a month for 9 months. Long-term

effects could not be reasonably estimated for several reasons, including the capital cost for improvements and the potential for replacement customers.

18. The city has three accounts associated with providing municipal water to its customers. The accounts are termed a capital reserve account, a debt reserve account, and an operating reserve account. The capital reserve account is for system improvements, replacements, and emergency repairs such as system failure. The debt reserve account is for the repayment of existing capital expenditures, such as for the new water tank of the city. The operating reserve account is for operating needs. The ending reserve balances for FY 2000 are approximately as follows (See Applicant's Exhibit 5):

Capital Reserve Account	-	\$365,184
Debt Reserve Account	-	\$ 38,763
Operating Reserve Account	-	\$ 70,421

With the approval of the mayor and city council, the operating reserve account could be used to offset short-term revenue loss resulting from a departing customer, such as the applicant. The other two accounts can not be used for this purpose.

19. The public witness in this matter testified that drying up 172 irrigated acres in the county is not in the local public interest and should not be allowed, even though in 1997 more than 151,000 acres of land were irrigated in Jerome County (see Applicant's Exhibit 21). The concern expressed by the public witness was based on allegations of a reduction in the county tax base and non-compliance with the Jerome County Comprehensive Plan.

20. The city's municipal system, which was originally constructed in 1918, contributes some sediment to the city's water supply. The city acknowledged that water provided from the applicant's wells may contain reduced sediment levels in the water and can be delivered with more consistent pressure to the plant.

21. The proposed changes will not injure other water rights. Based on the results from ground water modeling conducted by the Department, the impact from the consumptive use of ground water withdrawn from the proposed wells will have substantially the same effect on the Snake River as an equivalent amount of consumptive use of ground water at the original place of use.

22. The proposed changes do not constitute an enlargement in use of the original right.

23. The proposed changes are consistent with the conservation of water resources within the state of Idaho.

24. The proposed changes are in the local public interest since the temporary adverse

economic impacts that will be incurred by the city do not outweigh the economic and operational interests of the applicant and resulting benefits.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code;

2. Idaho Code § 42-203A(5) defines the “local public interest” as “the affairs of the people in the area directly affected by the proposed use.”

3. In Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985), the Idaho Supreme Court provided the following guidance in connection with the local public interest:

The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resource’s sound discretion.

4. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use, and will be consistent with principles of conservation of the water of the state of Idaho.

5. Both the applicant and the protestant have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant. The applicant has the final burden on all issues.

6. The economic impact of a departing municipal water use customer on the remaining water customers of the city is within the purview of the local public interest criterion and was duly considered by the Department in this case.

7. The short-term impact to the city as a result of the departure of the applicant as a customer can be passed on to the remaining municipal customers or can be paid by the city from its Operating Reserve Account. There is no evidence or testimony to suggest that the applicant’s departure will cause excessive harm to the city, or to the remaining customers of the

city.

8. The city could have made contingency provisions to counter the financial impact of a departing customer through the use of a contract with the applicant or other means.

9. The applicant should not be financially responsible to the city for ceasing to avail itself of the municipal water supply.

10. Cessation of the irrigation of 172 acres, which represents roughly one tenth of one percent of the irrigated land in Jerome County, is not contrary to the local public interest.

11. The proposed changes will not injure other water rights. The impact from the consumptive use of ground water withdrawn from the proposed wells will have substantially the same effect on the Snake River as an equivalent amount of consumptive use of ground water at the original place of use.

12. The proposed changes do not constitute an enlargement in use of the original right.

13. The proposed changes are consistent with the conservation of water resources within the state of Idaho.

14. The applicant has met its burden to show that the proposed changes are in the local public interest, and the applicant is not required to compensate the city for lost revenue as a condition to the proposed changes.

14. The Department should approve the application with certain conditions.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 5691 in the name of Jerome Cheese Co. is **APPROVED** subject to the following conditions:

1. Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion and the total volume of water diverted under the transfer.
2. The right holder shall measure and annually report to the West Water Measurement District of the Eastern Snake Plain Aquifer the annual volume of water diverted under this approval and the maximum rate of diversion.
3. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.

4. The total instantaneous rate of diversion of water from all points of diversion under this transfer shall not exceed 2.7 cfs, or a total annual volume of 516 acre feet.
5. Pursuant to Idaho Code § 42-1412(6), this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication District Court at a point in time no later than the entry of the final unified decree.
6. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
7. Two existing points of diversion are located within the NWNE Section 25, T8S, R16E, B.M. This transfer does not authorize the construction of additional wells.
8. The right holder shall provide to the Department satisfactory evidence to show that the sellers of the water rights have been notified that the application for transfer has been approved and that the obligation to dry up 172 acres by the sellers is in effect.

Signed this 24th day of November 2000.

____Signed____
Karl J. Dreher
Director